

1 UNITED STATES DISTRICT COURT  
2 WESTERN DISTRICT OF TEXAS  
3 WACO DIVISION

3 BLACKBIRD TECH, LLC ) Docket No. WA 20-CA-603 ADA  
4 )  
4 vs. ) Waco, Texas  
5 )  
5 EVERNOTE CORPORATION ) September 24, 2020

6  
7 TRANSCRIPT OF TELEPHONIC CONFERENCE  
8 BEFORE THE HONORABLE ALAN D. ALBRIGHT

9 APPEARANCES:

10 For the Plaintiff: Mr. Jeffrey D. Ahdoot  
11 Ms. Wendy Verlander  
12 Blackbird Tech, LLC  
13 One Boston Place, Suite 2600  
14 Boston, Massachusetts 02108  
15  
16 Mr. Christopher M. Joe  
17 Buether, Joe & Counselors, LLC  
18 1700 Pacific Avenue, Suite 4750  
19 Dallas, Texas 75201

20 For the Defendant: Ms. Elizabeth M. Chiaviello  
21 Morgan, Lewis and Bockius, LLP  
22 1000 Louisiana Street, Suite 4000  
23 Houston, Texas 77002

24 Ms. Candace Polster  
25 Morgan, Lewis and Bockius, LLP  
77 West Wacker Drive, Suite 500  
Chicago, Illinois 60601

26 Court Reporter: Ms. Lily Iva Reznik, CRR, RMR  
27 501 West 5th Street, Suite 4153  
28 Austin, Texas 78701  
29 (512)391-8792

30 Proceedings reported by computerized stenography,  
31 transcript produced by computer-aided transcription.

14:30:11 1 THE COURT: Good afternoon. It's Alan Albright.  
14:30:13 2 Suzanne, would you call the case, please?  
14:30:14 3 THE CLERK: Sure.  
14:30:15 4 Telephonic scheduling conference in Civil Action  
14:30:17 5 6:20-CV-603, styled, Blackbird Technology, LLC vs.  
14:30:22 6 Evernote Corporation.  
14:30:24 7 THE COURT: If I could hear announcements,  
14:30:26 8 please, from counsel, starting with the plaintiff.  
14:30:32 9 MR. HIPSKIND: Yes, your Honor.  
14:30:33 10 This is Dan Hipkind. I believe the case was  
14:30:35 11 incorrect. This is Sable Network, Inc. and Sable IP, LLC  
14:30:41 12 vs. Dell.  
14:30:42 13 THE COURT: Okay.  
14:30:47 14 MR. JOE: I'm sorry. Your Honor, this is Chris  
14:30:49 15 Joe. I think -- I guess I'm a little confused. I think  
14:30:53 16 you just called the Blackbird case.  
14:31:02 17 THE COURT: This is Alan Albright. I'm equally  
14:31:04 18 confused.  
14:31:05 19 Suzanne, which case do you need to call?  
14:31:08 20 THE CLERK: Well, Judge, I believe everyone  
14:31:10 21 either got moved or cancelled, except for the Blackbird  
14:31:14 22 case, which is the one that I just tried to call.  
14:31:16 23 THE COURT: Okay.  
14:31:19 24 THE CLERK: I could be wrong, but I believe  
14:31:21 25 that's the e-mail that I got from the law clerk.

14:31:27 1 THE COURT: Okay. Is there anyone for the  
14:31:29 2 Blackbird case? Let me try hearing from the plaintiff in  
14:31:31 3 the Blackbird case.

14:31:33 4 MR. JOE: Hi, your Honor. This is Chris Joe.  
14:31:34 5 I'm serving as local counsel for Blackbird. I have not  
14:31:38 6 heard from lead counsel on the line yet.

14:31:41 7 MR. AHDOOT: Yes. This is Jeffrey Ahdoot with  
14:31:44 8 Blackbird Technologies. And also on the line is Wendy  
14:31:47 9 Verlander with Blackbird Technologies. So from  
14:31:50 10 plaintiff's side, we're all here.

14:31:51 11 THE COURT: And anyone for defendant?

14:31:54 12 MS. CHIAVIELLO: Yes, your Honor.

14:31:55 13 Elizabeth Chiaviello for Evernote. With me, I  
14:31:59 14 have Candace Polster. We filed her PHV today, and we  
14:32:01 15 should have her appearance set in the next two days for  
14:32:03 16 you.

14:32:04 17 THE COURT: Okay. Fine.

14:32:05 18 And is there someone on the phone who thought  
14:32:09 19 they were supposed to be having a call at 2:30 that is a  
14:32:13 20 different case?

14:32:17 21 MR. HIPSKIND: Yes, your Honor.

14:32:18 22 This is Dan Hipkind, plaintiff's counsel in the  
14:32:21 23 Sable Networks vs. Dell Technologies case.

14:32:23 24 THE COURT: Okay. Is there anyone from defense  
14:32:27 25 side on that case?

14:32:30 1 MR. NEWTON: Yes, your Honor.

14:32:30 2 This is Mike Newton from Alston & Bird for the  
14:32:33 3 Dell Defendants.

14:32:33 4 THE COURT: Okay. Then I think we might be  
14:32:36 5 double booked. Let's do this. Hold on one second.

14:32:56 6 Okay. Those of you who are on the case involving  
14:32:59 7 Dell, we did not get it to you quickly enough apparently,  
14:33:09 8 but we are going to do that CMC next week. I apologize  
14:33:14 9 for that. This is the first time this has happened. And  
14:33:18 10 everyone who is on -- involved in the Dell case, if you  
14:33:25 11 accidentally screw something up, remind me of this and you  
14:33:29 12 get a free pass because clearly things could happen.

14:33:32 13 And so, if you all will -- on the Dell case, if  
14:33:37 14 you all will drop off. My understanding is, you're about  
14:33:40 15 to get an order setting the call for next week. And let  
14:33:46 16 me say this, in the Dell case, if there's anything that  
14:33:49 17 it's urgent that needs to be done before next week, I'll  
14:33:54 18 invite either counsel let me know right now.

14:34:00 19 MR. HIPSKIND: Nothing from plaintiffs, your  
14:34:00 20 Honor.

14:34:03 21 MR. NEWTON: I will say, I thought this was going  
14:34:04 22 to be a Zoom call, so I put on a suit and a tie. So I've  
14:34:07 23 been sitting here.

14:34:08 24 THE COURT: Well, it's not going to be a suit and  
14:34:11 25 tie -- it's not going to be on Zoom. You don't need to

1 have a suit and tie. However, I'm happy if the folks in  
2 the Dell case want to just hang on right now, I'm happy to  
3 do the case with Mr. Joe first and work through that, and  
4 then, I'll take up the Dell case immediately after, if  
5 that's okay with you all.

6 MR. NEWTON: That works fine for Dell.

7 MR. HIPSKIND: That's great for the plaintiffs,  
8 your Honor.

9 THE COURT: Okay. Let's do that then.

10 So, Suzanne, one more time, just because you have  
11 this colloquy, why don't you call the case, and I'll have  
12 Mr. Joe and opposing counsel announce in that case. We'll  
13 take that up. And then, immediately after that, you can  
14 call -- we'll -- Suzanne will make sure you have the  
15 appropriate style in the Dell case, and you can call back,  
16 Mr. Joe and company, and I'll take up the second case.

17 So let's do it that way. That way, I can't screw  
18 up so badly. So, Mr. Joe, are you going to be speaking or  
19 is it someone else on behalf of the plaintiff?

20 MR. JOE: I believe it will be Mr. Ahdoot that  
21 will be speaking primarily, but I'm happy to introduce  
22 everybody, your Honor.

23 THE COURT: If you would do that for me, please.

24 MR. JOE: Okay. On behalf of the Plaintiff  
25 Blackbird, it is Chris Joe with Buether, Joe & Counselors

14:35:30 1 and Jeffrey Ahdoot and Wendy Verlander.

14:35:33 2 THE COURT: Okay. So is there an issue that we

14:35:39 3 need to take up specifically with regard to the CMC?

14:35:44 4 Typically, I only have these calls if there's an issue

14:35:46 5 that you wanted to talk to me about.

14:35:50 6 MR. JOE: Yes, your Honor, I believe there is.

14:35:51 7 I'll let Mr. Ahdoot address it.

14:35:54 8 THE COURT: Okay. Please do.

14:35:55 9 MR. AHDoot: Yes, your Honor.

14:35:56 10 Actually, the issue was raised by defendant's

14:35:59 11 counsel, so it might make sense for them to raise their

14:36:03 12 issue and then, if you'll permit me to respond.

14:36:06 13 THE COURT: Of course I will.

14:36:07 14 So let me hear from defense counsel and just

14:36:10 15 identify whoever's going to be speaking, and then, I'm

14:36:12 16 happy to hear any response.

14:36:14 17 MS. CHIAVIELLO: Thank you, your Honor.

14:36:17 18 Elizabeth Chiaviello for Evernote.

14:36:19 19 We wanted to request this CMC with you to address

14:36:22 20 Evernote's request for a modification to the Court's

14:36:25 21 default scheduling procedures.

14:36:27 22 THE COURT: Okay.

14:36:28 23 MS. CHIAVIELLO: Evernote, we believe, has a

14:36:30 24 strong on-sale bar defense, and we believe that it would

14:36:33 25 add a lot of efficiency to this case to maybe shuffle that

1 issue up front. But before I get into that request, I did  
2 want to give you a little bit of background that the  
3 parties did have a meet-and-confer on this issue on  
4 Monday, as well as for items that were set out in your  
5 OGP, your order governing proceedings.

6 At the meet-and-confer, we did give counsel a  
7 summary of the defense, our request for modifying the  
8 schedule, and we also said we would follow up with a  
9 letter. We did follow up with the letter and the claim  
10 chart laying this defense out more formally, but we didn't  
11 give it to them until later last night. So it may make  
12 sense for the parties to still -- they may still benefit  
13 from the meet-and-confer on this issue. But nonetheless,  
14 we still wanted to come before you on the scheduling  
15 request.

16 THE COURT: Let me ask you this, ma'am, if I can.

17 MS. CHIAVIELLO: Sure.

18 THE COURT: What discovery, if any, would you  
19 need to take to prepare your motion for -- to be filed  
20 with me?

21 MS. CHIAVIELLO: Elizabeth Chiaviello again for  
22 Evernote.

23 With Evernote's on-sale bar defense, we are in  
24 possession of the discovery. We have offered to  
25 plaintiffs items for their inspection. For example, we

1 have provided them with products manuals that display the  
2 earliest date that Evernote's products was on sale prior  
3 to what we understand to be Blackbird's earliest priority  
4 dates. I believe they disclosed in their infringement  
5 contentions that their earliest filing date was May 26,  
6 2009. The earliest invention date was November 7th, 2006.  
7 And Evernote's position is that its product which meets  
8 the claim limitations as set forth in the infringement  
9 contentions meets every limitation, but was on sale more  
10 than a year before. And I believe that date was February  
11 7th, 2016.

12 THE COURT: Okay. Let me hear from -- were you  
13 done, Ms. Chiaviello?

14 MS. CHIAVIELLO: Yes. Aside from proposing our  
15 scheduling modification, that's all I have to say for  
16 that.

17 THE COURT: Okay. Let me hear from counsel for  
18 the plaintiff, please.

19 MR. AHDOOT: Yes. Thank you, your Honor.

20 So as Ms. Chiaviello said, defendants raised this  
21 on our meet-and-confer for the first time on Monday. They  
22 said they would get us some materials, some proof or some  
23 evidence of their defense as soon as they could. As  
24 counsel correctly noted, that came in later last night,  
25 and so, we really have not had any real opportunity to



1 evaluate it, to look at it.

2 And just seeing what they did send, there's  
3 obviously going to -- we're going to require more to truly  
4 evaluate and confirm their position. They proposed some  
5 sort of four-months-early summary judgment proceeding in  
6 which there would be some discovery and then, some summary  
7 judgment briefing. Your Honor, you know, we rejected  
8 that. And while, you know, we're not saying that in no  
9 condition can we -- you know, do we want to evaluate that  
10 and we want to press forward, we don't think that  
11 schedule's necessary in terms of going through their whole  
12 four-month process and going through summary judgment.

13 But, you know, to be reasonable, we do want to  
14 evaluate this and we take it seriously, and we would be  
15 open to some early discovery from them, you know, to  
16 really confirm and understand what this defense is, you  
17 know, look under the hood more than just kind of the claim  
18 chart that they sent us of screen shots, you know, get the  
19 code that we need, the source code to confirm that the  
20 functionality that they're claiming is there or was there,  
21 is there and is still there in the accused product.

22 Those are the type of things we would need. I  
23 don't think that would take a, you know, terribly long  
24 time. Maybe a month, maybe six weeks to do that, and  
25 then, maybe, you know, we can go from there. But I don't

14:40:42 1 think we need to set some sort of summary judgment  
14:40:45 2 schedule right now because, you know, we have no intention  
14:40:48 3 of moving forward if there's merit to their defense. We  
14:40:52 4 just want time to evaluate it.

14:40:53 5 THE COURT: Thank you.

14:40:54 6 Let me say, I think God just intended for me to  
14:40:58 7 want to postpone one of these scheduling conferences, and  
14:41:02 8 I started with the wrong one.

14:41:05 9 Here is what I'm going to do. I'm going to reset  
14:41:09 10 this -- I won't give you a date. You guys could contact  
14:41:13 11 my law clerks. But I'm going to give you a month to do  
14:41:19 12 what the plaintiff's counsel suggested. The defendant  
14:41:26 13 needs to get -- I want the defendant to get to the  
14:41:28 14 plaintiff everything that they have that without the  
14:41:33 15 plaintiff asking for it in discovery. If -- let me start  
14:41:36 16 over.

14:41:37 17 If the defendant wants -- and by the way, I think  
14:41:41 18 -- I'm encouraged by the plaintiff's approach here, which  
14:41:43 19 is, you know, I've been through these cases on both sides  
14:41:49 20 of this issue, and there's not much point moving forward  
14:41:52 21 if there is actually an on-sale bar; but the plaintiff  
14:41:57 22 won't know that unless they have an opportunity to look  
14:42:00 23 through everything.

14:42:01 24 So I'm going to order the defendant to give to  
14:42:05 25 the plaintiff everything they have in their possession

1 currently that's not privileged that would substantiate an  
2 on-sale bar defense. After the plaintiff receives it, if  
3 the plaintiff needs additional information, I think he  
4 mentioned maybe source code, which might be needed to, you  
5 know, to determine whether or not the functionality is --  
6 was infringing or not. Whatever the plaintiff needs, I  
7 want you all to work out and exchange of that.

8 And the exchange should be bilateral. If the  
9 defendant needs certain very specific information from the  
10 plaintiff, I want you all to do -- to exchange it. In  
11 about a month, contact my law clerk, whichever law clerk  
12 is handling this case, and reset this scheduling  
13 conference. I will be better able to hear at that time  
14 whether or not I think there's sufficient merit to the  
15 on-sale bar argument to warrant setting a -- before we do  
16 everything else, setting a summary judgment motion  
17 schedule to try and resolve it. And I'm completely open  
18 to that.

19 You know, I think in a month when we have the  
20 CMC, if you all tell me -- if the defendant persuades me  
21 that they could make an argument in good faith on an  
22 on-sale bar motion, probably what I'll do is, I'll have  
23 y'all brief it quickly and set a hearing for it as soon as  
24 the briefing is ripe, and get you a resolution at a  
25 hearing immediately after the briefing is ripe.

14:43:58 1 If that motion were successful, we'll go in one  
14:44:03 2 direction. If the motion were unsuccessful, then we can  
14:44:05 3 take up the scheduling order in kind of regular of course.  
14:44:10 4 But that should only cost us, I would think, total maybe  
14:44:15 5 three months, at the most, from now. That would include  
14:44:18 6 the window for the exchange of information, and the  
14:44:21 7 evaluation by the plaintiff, and all the briefing if there  
14:44:25 8 is to be briefing, and the hearing, and a resolution of  
14:44:28 9 this matter.

14:44:28 10 So the Court will handle this very expeditiously.  
14:44:35 11 All that being said, is there anything else, starting with  
14:44:38 12 the defendant, you'd like to take up before we adjourn and  
14:44:42 13 we get back together in a month?

14:44:45 14 MS. CHIAVIELLO: No, your Honor.

14:44:46 15 Elizabeth Chiaviello for defendant. Nothing  
14:44:49 16 else.

14:44:49 17 THE COURT: And for plaintiff?

14:44:52 18 MR. AHDOOT: This is Mr. Ahdoot.

14:44:52 19 No. Nothing further, your Honor.

14:44:53 20 THE COURT: Okay. And let me -- I'm not sure --  
14:44:59 21 I don't remember whether or not -- who's been in front of  
14:45:02 22 me before or not, but I realize I'm -- at some level, I am  
14:45:06 23 giving you sort of a general or generic request of what  
14:45:10 24 you should exchange.

14:45:12 25 If there is an issue between counsel as to what

14:45:15 1 needs to be provided, the way I handle things in my court  
14:45:20 2 is, I don't want you all spending enormous number of hours  
14:45:24 3 trying to figure out what gets exchanged or doesn't. If  
14:45:27 4 you come to an impasse, just contact my law clerk, I'll  
14:45:30 5 set a phone conference very quickly. I know what it is I  
14:45:34 6 want you to be doing, and I could be very helpful in  
14:45:37 7 encouraging either side to get stuff done.

14:45:42 8           So just if you have a problem, just contact me,  
14:45:45 9 and I'll stay as involved as possible. Because I really  
14:45:49 10 do want this issue to be completely resolved in a manner  
14:45:52 11 that doesn't push back the schedule in this case too much.

14:45:59 12           Everyone who is involved in the case I just  
14:46:02 13 discussed, you're welcome to drop off unless you just like  
14:46:07 14 to hear another exciting scheduling conference take place,  
14:46:11 15 which you're welcome to do, as well. And again, if you  
14:46:14 16 have any problems, let my clerk know and we'll set a  
14:46:17 17 hearing quickly.

14:46:18 18           Other than that, be safe. I look forward to  
14:46:21 19 talking to you in a month.

14:46:22 20           MR. AHDOOT: Thank you, your Honor.

14:46:23 21           MS. CHIAVIELLO: Thank you, your Honor.

14:46:25 22           MR. JOE: Thank you, your Honor.

23           (Proceedings concluded.)  
24  
25

\* \* \* \* \*

UNITED STATES DISTRICT COURT )  
WESTERN DISTRICT OF TEXAS )

I, LILY I. REZNIK, Certified Realtime Reporter,  
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LILY I. REZNIK, CRR, RMR  
Official Court Reporter  
United States District Court  
Austin Division  
501 W. 5th Street,  
Suite 4153  
Austin, Texas 78701  
(512)391-8792  
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LILY I. REZNIK, OFFICIAL COURT REPORTER  
U.S. DISTRICT COURT, WESTERN DISTRICT OF TEXAS (AUSTIN)